LIBRARY
SUPREME COURT, U. S.

FILED
JUN 8 1972
MICHAEL RODAK, JR., CLERK

No. 71-1351

In the Supreme Court of the United States

OCTOBER TERM, 1971

DONALD ROBERT BRENNEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1351

DONALD ROBERT BRENNEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A four-count indictment returned in the United States District Court for the Western District of Pennsylvania charged petitioner, Hershberger and Holly with two sales of amphetamine sulphate ("speed"), the manufacturing of the drug, and conspiracy to manufacture and sell the drug (Tr. 120-123).[1] Hershberger pleaded guilty to one count and

[1] "Tr." refers to the transcript of the trial testimony, Volumes I and II of which we are filing with the Clerk of this Court.

Holly to two counts (Tr. 91, 131). They testified as government witnesses in the trial against petitioner. The jury found petitioner guilty on all four counts, and he was sentenced to imprisonment for three years and ordered to pay a $3,000 fine. In a *per curiam* opinion (Pet. App. A) the court of appeals affirmed the conviction.

1. The question presented by the case is whether the trial judge committed reversible error in sustaining the government's objection to a question that asked a government witness to reveal the name of a confidential informant when the informant's role had been peripheral to the case against the petitioner.

Holly testified that in March 1970, he and Hershberger agreed that he would locate someone who would purchase substantial quantities of "speed" and that Hershberger would find a supplier (Tr. 95-96). Hershberger testified that petitioner, a chemist who had previously manufactured "speed" for him, agreed to be the supplier (Tr. 135-141). Meanwhile, Holly talked to a "friend," who had located a buyer, and a meeting was arranged for April 20, 1970 (Tr. 95-98). On that date, petitioner told Hershberger to pick up 7 ounces of amphetamine sulphate from the front seat of petitioner's truck (Tr. 142-143). Hershberger did this and delivered the drugs to Holly (Tr. 98-99, 143). That evening the "friend" brought "Ed" to the dairy bar where Holly worked (Tr. 99). Holly and "Ed" talked about price and quality (Tr. 99, 100). The "friend" sat in a booth about fifteen feet

away (Tr. 41). "Ed" bought the drugs (Tr. 15, 99-100). Holly delivered part of the purchase price to Hershberger, who divided it with the petitioner (Tr. 29, 103, 118, 128, 144-145). "Ed" turned out to be narcotics agent Scheid (Tr. 99), and the "friend" was a confidential government informant (Tr. 112-113).

On May 5, 1970, a second sale of drugs was made in a manner substantially similar to the first (Tr. 105-107, 148-150), but with a different narcotics agent and without the presence of the informant (Tr. 56, 105-106).

On May 19, 1970, pursuant to a search warrant, narcotics agents searched the basement of the residence of petitioner's mother, where petitioner maintained a chemistry laboratory, and seized items which contained residues of amphetamine sulphate (Gov. Exs. 8, 8A, 9, 9A, 10, 10A, 11, 11A, 12, 12A, 13, 13A and 13B) (Tr. 237-250). On that date, pursuant to an arrest warrant, petitioner was arrested at his residence (Tr. 279). In petitioner's briefcase, seized at the time of his arrest, was one jar containing amphetamine sulphate and another containing amphetamine hydrochloride (Gov. Exs. 14, 14A, 14B) (Tr. 345-349, 357).[2]

2. On cross-examination of Holly, petitioner's attorney asked Holly the name of his friend. The government objected that he was a confidential inform-

---

[2] Testifying in his own behalf, petitioner denied that he had ever manufactured drugs for Hershberger, or furnished him with them. Petitioner also denied that Hershberger had paid him money resulting from the sale of drugs (Tr. 413-416).

ant and the Court sustained the objection (Tr. 112-114). Both courts below ruled correctly that the government was not required to divulge the identity of the confidential informant. In *Roviaro* v. *United States*, 353 U.S. 53, this Court held in the circumstances of that case that the informer's identity must be revealed in the interest of a fair trial, but the court admonished that no firm rule could be laid down and that each case must be decided on its own facts (*id.* at 62). This case is unlike the situation in *Roviaro* where the informant was the sole participant, other than the accused. Here the informant had no contact whatever with petitioner and the immediate participants in the first narcotics sale were Holly and the undercover narcotics agent. Moreover, petitioner's request for the informant's identity was predicated upon mere speculation that disclosure would be helpful to the defense of petitioner's case. Any possible contradiction or amplification of Holly's testimony as a result of disclosure of the informant's identity would at best have been of minimal benefit to petitioner since it was Hershberger, who had nothing to do with the informant, whose testimony directly implicated petitioner as the supplier of the drugs.[3] In such circumstances protection of the in-

[3] Indeed if petitioner had seriously believed that disclosure of the informant's identity would have been helpful to his defense he could have requested an *in camera* hearing to make a factual showing to support this assertion. Such a procedure has been approved by the Third Circuit. *United States* v. *Jackson*, 384 F. 2d 825, 827, certiorari denied, 392 U.S. 933; *United States* v. *Winters*, 420 F. 2d 523, 524.

formant outweighs the need for disclosure. *Rugendorf* v. *United States*, 376 U.S. 528, 534-536; *McCray* v. *Illinois*, 386 U.S. 300, 305-314; *Lannom* v. *United States*, 381 F. 2d 858, 861 (C.A. 9), certiorari denied. 389 U.S. 1041.

As to entrapment, since petitioner denied guilt by testifying that he had never manufactured drugs, nor furnished Hershberger with them, he was in no position to assert this defense. See *McCarty* v. *United States*, 379 F. 2d 285 (C.A. 5), certiorari denied, 389 U.S. 929; *United States* v. *Rodrigues*, 433 F. 2d 760, 761 (C.A. 1), certiorari denied, 401 U.S. 943; *United States* v. *Mehciz*, 437 F. 2d 145, 149 (C.A. 9), certiorari denied, 402 U.S. 974. But see *Hansford* v. *United States*, 303 F. 2d 219, 221 (C.A. D.C.). Moreover, petitioner did not deal with the informant or with Holly, but with Hershberger.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1972.

U. S. GOVERNMENT PRINTING OFFICE, 1972 407374 7-8